Supreme Court, U.S.
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No. 02 761

In The
Supreme Court of the United States

ALFONSO ALVAREZ-PORTILLO,

Petitioner,

vs.

JOHN ASHCROFT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in denying Petitioner's Motion for Attorney's Fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), *et seq.*, and for reconsideration of its earlier denial of EAJA attorney's fees where the court made no finding either that the Respondents' pre-litigation actions and their litigation positions were "substantially justified" or that "special circumstances" made the award of EAJA fees to Petitioner "unjust," but where the court found Respondents' actions deprived Petitioner of a substantive defense he previously enjoyed and resulted in "an impermissible retroactive effect" that "may well require adjusting the process which is due."

PARTIES TO THE PROCEEDINGS

The Petitioner is Alfonso Alvarez-Portillo. Respondents are John Ashcroft, Attorney General of the United States; Mary Ann Wyrsch, Commissioner, Immigration and Naturalization Service; Michael Heston, District Director, Kansas City INS; and Tex Othic, Head of Deportations, Kansas City INS.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Alfonso Alvarez-Portillo, by and through his appointed counsel of record, David Froman, respectfully petitions for a writ of certiorari to issue to review the order of the United States Court of Appeals for the Eighth Circuit entered on the 15th day of August, 2002.

OPINIONS BELOW

On August 15, 2002, the Court of Appeals for the Eighth Circuit entered an order (Pet. App. 1) denying the Petitioner's motion for attorney's fees under the Equal Access to Justice Act (EAJA) and for reconsideration of the court's order of April 10, 2002 (Pet. App. 2) denying EAJA attorney's fees. The February 13, 2002, opinion and judgment of the court of appeals (Pet. App. 4-18, 19-20) granted the Petitioner's petition for review and vacated the February 13, 2001, order of the Immigration and Naturalization Service (INS) (Pet. App. 21) that retroactively reinstated his previous deportation and removed him from the United States. The opinion is reported at 280 F.3d 858 (8th Cir. 2002).

JURISDICTION

On February 13, 2002, the court of appeals filed its opinion vacating the INS Reinstatement Order. On April 10, 2002, the court granted Petitioner's subsequent motion for costs, but denied his motion for EAJA attorney's fees and the Respondents' petition for rehearing. Within 30 days after the judgment was final, Petitioner timely moved for additional EAJA attorney's fees, amended previous

calculations, and asked the court to reconsider its earlier denial of his motion for attorney's fees. On August 15, 2002, the court of appeals denied Petitioner's motion. The time within which to file a petition for a writ of certiorari extends to and includes November 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2412(d), *et seq.* (EAJA)

INA § 241(a)(5) (8 U.S.C. § 1231(a)(5)) (reinstatement statute)

INA § 245(i) (8 U.S.C. § 1255(i)) (penalty fee statute)

INA § 212(a)(9)(A)(iii) (8 U.S.C. § 1182(a)(9)(A)(iii)) (waiver alternative to reinstatement statute)

(See Appendix for full text of statutes).

STATEMENT OF THE CASE

This case involves the denial of a motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), *et seq.*, and for reconsideration of the court of appeals' earlier denial of EAJA fees without explanation following a successful challenge to the actions of the INS. The court ordered its denials in both instances without making the requisite findings, on which the Respondents bore the burden of proof, to defeat the statutory award of fees to a party prevailing against the government.

The Petitioner, a citizen of Mexico, had last entered the United States without inspection on or about December 20, 1993, following his deportation for entering illegally. He had resided continuously in the United States since then, working primarily in the construction industry and had married a U.S. citizen on November 23, 1996. As the "immediate relative" spouse of a U.S. citizen, he was entitled to apply for "adjustment of status" to lawful permanent residence.

On April 1, 1997, a new "reinstatement" statute, Immigration and Nationality Act (INA) § 241(a)(5), 8 U.S.C. § 1231(a)(5), came into effect, omitting an explicit retroactivity provision and expanding its scope to cover for the first time aliens "removed" for illegal entry who reenter the United States illegally. (The text of this statute appears in the court's opinion, Pet. App. 7-8).

On February 12, 2001, Petitioner and his wife traveled to the INS District Office in Kansas City to tender their immigration petition and adjustment of status application and filing fees, including the $1000 penalty fee under INA § 245(i), 8 U.S.C. § 1255(i) (Pet. App. 26), which permitted otherwise qualified applicants who entered the United States without inspection to obtain their permanent residency without leaving the United States. After they had submitted their applications, INS agents arrested Petitioner, took him into custody, and retroactively applied the new "reinstatement" statute to order his removal to Mexico under the 1993 deportation order. They returned the petition and applications to Mrs. Alvarez unfiled.

On February 21, 2001, Petitioner petitioned the Court of Appeals for the Eighth Circuit under the authority of

INA § 242(a)(1), 8 U.S.C. § 1252(a)(2), and 28 U.S.C. § 2342 for review of the INS reinstatement order and moved for a temporary stay of removal, which the court granted until March 5, 2001.

On February 26, 2001, while Petitioner was in custody, he filed with the District Director a Form I-212 (Application for Permission to Reapply for Admission Into the United States After Deportation or Removal) in conjunction with his previously tendered application for adjustment of status to permanent resident. 8 C.F.R § 212.2(a), (e), & (i) (Pet. App. 29).

On March 5, 2001, the court of appeals dissolved the stay. On March 6, 2001, Petitioner filed with the District Director an application for release on bond or on his own recognizance pending the decision of the court. On March 12, 2001, the District Director denied the application for bond or release and proceeded to remove Petitioner at El Paso, Texas, on March 13, 2001.

On March 20, 2001, a week after removing Petitioner to Mexico, the District Director approved Petitioner's Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal.

On February 13, 2002, the court of appeals issued its opinion granting the Petitioner's petition and vacating the INS reinstatement order. The court found that the actions of the Respondents (the INS) applying the "reinstatement" statute to the Petitioner for conduct that occurred before the effective date of the statute deprived him of a substantive defense and had "an impermissible retroactive effect" when applied to Petitioner such that "the relevant inquiry on remand may well require adjusting the process which is

due." 280 F.3d at 867 (Pet. App. 16-18), *citing Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997), and the Ex Post Facto Clause, Article I, § 10, cl. 1, of the Constitution.

On April 10, 2002, the court of appeals granted the Petitioner's bill of costs, but denied without opinion Petitioner's application for EAJA attorney's fees (filed early because of court rules) and the Respondents' petition for rehearing.

On May 7, 2002, the INS permitted Petitioner to reenter the United States in a parole status to resume his application for permanent residence.

On August 6, 2002, within 30 days after the judgment of the court of appeals became final, Petitioner renewed his application for attorney's fees under EAJA, with a more detailed discussion of the fee calculations and Respondents' lack of substantial justification for its pre-litigation conduct and litigation positions, and moved the court to reconsider its earlier denial.

On August 15, 2002, the court of appeals denied without opinion Petitioner's motion for attorney's fees under EAJA and reconsideration of the earlier denial. This petition is made within 90 days of that denial.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Eighth Circuit has issued an order involving an important federal question which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rules of Supreme Court 10(a). Its order also

decides an important federal question in a way that conflicts with relevant decisions of this Court. Rules of Supreme Court 10(c).

The award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), *et seq.*, performs an important and fundamental function in our democracy. It increases access of individuals to challenge unreasonable governmental actions and provides a means to improve government policies:

> An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. . . . Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

Commissioner, INS v. Jean, 496 U.S. 154, 165 n.14 (1990), *citing* H.R.Rep. No. 96-1418, p.10 (1980). Under the EAJA,

> a court shall award to a prevailing party . . . fees and other expenses, . . . incurred by that party in any civil action, . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). "[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions. [internal citation omitted]" *Jean*, 496 U.S. at 163.

> In EAJA cases, the Court first must determine if the applicant is a "prevailing party" by evaluating the degree of success obtained. If the Government then asserts an exception for substantial justification or for circumstances that render an award unjust, the court must make a second finding regarding these additional threshold conditions.

Id. at 160. Unless the government can prove that its position was "substantially justified," EAJA fees must be awarded. 28 U.S.C. § 2412(d)(1)(A).

Congress placed a heavy burden of proof on the government to demonstrate that its position was substantially justified.[1] To meet this burden, the government must show that its position had a reasonable basis both in law and in fact. *Pierce v. Underwood*, 487 U.S. 552, 563 (1988). The government must meet this threshold twice – it must independently establish that the agency action giving rise to the litigation was substantially justified *and* that its litigation positions were also substantially justified. 28 U.S.C. § 2412(d)(2)(D); *Jean*, 496 U.S. at 159. If it cannot do both, EAJA fees must be awarded.

Here, Plaintiff challenged an unreasonable government action and won.[2] The court of appeals has twice

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[1] H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 10, 13-14 (1980); *United States v. First National Bank of Circle*, 732 F.2d 1444 (9th Cir. 1984); *Ramos v. Haig*, 716 F.2d 471, 473 (7th Cir. 1983) (Government must make a "strong showing" that its position has a reasonable basis, *citing S & H Riggers & Erectors, Inc., v. OSHRC*, 672 F.2d 426, 431 (5th Cir. 1982)).

[2] The victory, however, was costly. Petitioner applied for EAJA attorney's fees in the amount of $47,432.27 for over 325 counsel hours

(Continued on following page)

during this litigation considered the Plaintiff's application for attorney's fees under the EAJA. Both times it denied the fee application without opinion. This practice departs from the well-accepted rule of law pronounced by this Honorable Court that places upon the government the burden of proving either its pre-litigation actions and litigation positions were "substantially justified" or the existence of "special circumstances" that would make the award of fees unjust.[3] The court of appeals made no such findings.

Respondents' pre-litigation conduct was without substantial justification. Following a "get tough" policy, the INS ignored the parallel waiver procedure in its statutes and regulations for which Petitioner qualified. INA § 212(a)(9)(A)(iii); 8 C.F.R § 212.2(a), (e), & (i). (Pet. App. 28-31). This alternative procedure would have

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in this matter, not including this petition. Just as Petitioner had to challenge the original governmental action as unreasonable, again he must seek application of this statute intended to assist individuals who at great expense are forced to choose between unchecked government action and financial ruin.

[3] Under the relevant INS statutes and Respondents' own regulations, the Petitioner qualified for adjustment of status to permanent resident by the submission of the penalty fee under INA § 245(i) for his undocumented entry and by applying for *nunc pro tunc* permission to reenter the United States, following his previous deportation, under 8 C.F.R § 212.2(a), (e), & (i). These remove him from the realm of "special circumstances" (e.g., unclean hands as an immigration violator) that might be invoked to make the award of attorney's fees to him "unjust." *Cf.* note 5, *infra*. Therefore, the only remaining ground on which the court could deny attorney's fees is that the Respondents' conduct was "substantially justified." The court made no such finding. To the contrary, the actions of the Respondents before and during the litigation were *not* substantially justified.

satisfied the court's finding of deficiency in the "process" the Respondents actually followed. 280 F.3d at 867. *Cf. Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (Government not substantially justified in violating its own procedures and regulations).[4]

During litigation, even in the face of this Court's declaration in *INS v. St. Cyr*, 533 U.S. 289, 325 (2001), "There is a clear difference, between facing possible deportation and facing certain deportation," Respondents maintained that *St. Cyr*, decided while this case was in briefing, did not apply. Not only did it apply, together with *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), it proved pivotal to the outcome of this case. Consistent with their earlier actions, Respondents again totally ignored and refused to acknowledge the alternative procedure provided in their own INS regulations that would have avoided Petitioner's reinstatement and removal in this case.[5]

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[4] The INS also applied the new reinstatement procedure retroactively to Petitioner for conduct that occurred before the effective date of the statute despite contrary precedent in the only court of appeal to have considered the question prior to this litigation. *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001).

[5] These regulations and case precedent provide for retroactive permission to enter the United States, thus converting an illegal entry into a lawful entry when the I-212 is filed "in conjunction with" an adjustment of status application. 8 C.F.R § 212.2(e) & (i); *Matter of Vrettakos*, 14 I&N Dec. 593, 599 (BIA 1973, 1974). *Cf. Matter of G-N-C*, 22 I&N Dec. 281, Int. Dec. 3366, 1998 BIA Lexis 32, at 65-67 (BIA 1998): Board Member Rosenberg, dissenting on other matters, cites the regulation and observes that the

> explicit authority of an Immigration Judge to consider requests for permission to apply for reentry, nunc pro tunc, in

(Continued on following page)

Even if the government was substantially justified in certain aspects of the case, where the legal and factual issues were intertwined with those claims that the government was not substantially justified in asserting, the prevailing party "should be fully compensated" for its work. *Haitian Refugee Center v. Meese, supra*, 791 F.2d at 1500.

The Respondents' actions and positions in this case, if not unreasonable on their face, at least raise the important question of whether they were substantially justified– a question that under the EAJA statute and the decisions of this Court merits the finding of prescribed facts prior to the decision to grant or deny EAJA fees. The Court of Appeals for the Eighth Circuit departed from this accepted and usual course of judicial proceedings in this case.

Therefore, the court's decision to deny the award of fees to the prevailing Petitioner in this case without requiring the Respondents to meet their burden, and

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order to achieve an appropriate and necessary disposition of the case, is longstanding and was not disturbed by the amendments to the statute [e.g., the new reinstatement section].

She explains further that application of the regulation would

> affect [an alien's] status in such a way *that his entry, no matter what its earlier character, is considered lawful, nunc pro tunc. Such a determination would take him outside of section 241(a)(5)* [8 U.S.C. § 1231(a)(5)] *of the Act under any reading of the provision, because his reentry would not be considered illegal.*

Emphasis added. Although the District Director has parallel authority under his jurisdiction, Respondents refused to apply this procedure to Petitioner or even to acknowledge its existence.

without stating its findings, is arbitrary and capricious, and an abuse of discretion. It decides an important federal question in a way that conflicts with relevant decisions of this Court and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 13, 2002

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 01-1430

Alfonso Alvarez Portillo,	*	
	*	
Petitioner,	*	
v.	*	Petition for Review
	*	
John Ashcroft, etc., et al.,	*	
Respondents.	*	

Petitioner's motion for reconsideration of the April 10, 2002, court order denying attorney fees has been considered by the Court and is denied.

August 15, 2002

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 1-1430

Alfonso Alvarez-Portillo,	*	
	*	
Petitioner,	*	
	*	
v.	*	Petition for Review of
	*	an Order of the
John Ashcroft, Attorney	*	Immigration and
General; Mary Ann Wyrsch,	*	Naturalization Service.
Commissioner, Immigration	*	
and Naturalization Service;	*	
Michael Heston, District	*	
Director; Tex Othic, Head of	*	
Deportation, Kansas City INS,	*	
	*	
Respondents.	*	

Petitioner's motion for order directing respondents to return petitioner to the United States has been considered by the Court and is denied.

Petitioner's motion for an attorney's fee award has been considered by the Court and is denied.

Petitioner's motion for the award of his costs has been considered by this Court and is granted. Petitioner shall recover from the respondents the sum of four hundred fifty five dollars and thirty two cents ($455.32) as taxable costs on appeal.

(5232-010199)

April 10, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1430

Alfonso Alvarez-Portillo, Petitioner, v. John Ashcroft, Attorney General; Mary Ann Wyrsch, Commissioner, Immigration and Naturalization Service; Michael Heston, District Director; Tex Othic, Head of Deportation, Kansas City INS, Respondents.	*	Petition for Review of an Order of the Immigration and Naturalization Service.

The petition for rehearing by the panel filed by the respondents is denied.

(5193-010199)

April 10, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1430

Alfonso Alvarez-Portillo, Petitioner, v. John Ashcroft, et al., Respondents.	* * * * * * *	Petition for Review of an Order of the Immigration and Naturalization Service.

Submitted: September 10, 2001
Filed: February 13, 2002

Before LOKEN and FAGG, Circuit Judges, and BOGUE,* District Judge.

LOKEN, Circuit Judge.

Alfonso Alvarez-Portillo appeals the decision of the Immigration and Naturalization Service (INS) reinstating his prior order of deportation and ordering his removal under § 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(5), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009-546

* The HONORABLE ANDREW W. BOGUE, United States District Judge for the District of South Dakota.

(1996).[1] Section 241(a)(5) was enacted to expedite the removal of aliens who illegally reenter this country after being deported. The issue before us is whether § 241(a)(5) may be applied to aliens such as Alvarez-Portillo who illegally reentered before the statute's enactment. Applying the retroactivity analysis of *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), we conclude that new procedures may be applied to expedite all reinstatement proceedings commenced after the enactment of § 241(a)(5), but the substantive defenses to removal eliminated by § 241(a)(5) may not be retroactively denied to aliens who illegally reentered prior to enactment. Accordingly, we vacate the removal order and remand for further proceedings.

I. Background.

Alvarez-Portillo, a citizen of Mexico, illegally entered the United States in November of 1993. After a full deportation hearing, he was deported to Mexico on December 8, 1993. Twelve days later, he illegally reentered the United States. He avoided INS detection for more than seven years, living and working under an assumed name and marrying a United States citizen in November 1996. In February 2001, Alvarez-Portillo and his wife visited an INS district office to apply for an adjustment of his status

[1] Immigration law can be confusing to the outsider because experts usually refer to the statutes by their INA and IIRIRA section numbers, while most of us have access only to the codified version of those statutes. With some reluctance, our opinion will yield to this reality by referring to the statutes at issue by their INA and IIRIRA section numbers, with an initial cross-reference to their very different section numbers in Title 8 of the United States Code.

to permanent resident alien. Discovering his prior deportation order, the INS took Alvarez-Portillo into custody, commenced this proceeding under § 241(a)(5), reinstated the 1993 deportation order, and ordered his immediate deportation to Mexico. Alvarez-Portillo appeals this final agency action, arguing that the INS improperly applied § 241(a)(5) retroactively because his illegal reentry occurred before the statute's enactment. Alternatively, he argues that the agency's procedures for implementing § 241(a)(5) violate his right to procedural due process. Finally, Alvarez-Portillo argues that INA § 245(i), 8 U.S.C. § 1255(i), conflicts with and supersedes § 241(a)(5); we reject this argument without discussion as it is without merit.

II. IIRIRA Changes to Reinstatement and Removal.

To place the *Landgraf* retroactivity analysis in proper perspective, it is essential to define the precise impact of the new statute. In December 1993, when Alvarez-Portillo illegally reentered the country, and up until the effective date of IIRIRA, the INA provided that, if a deported alien should illegally reenter, "the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." INA § 242(f), 8 U.S.C. § 1252(f) (1994). In practice, however, this strong language was tempered by the statute's limited scope. Section 242(f) applied only to aliens who were initially deported for enumerated reasons (such as criminal offenses). It did not apply to aliens such as Alvarez-Portillo who were deported for entering the country without inspection; aliens in this category who illegally reentered

were entitled to a new deportation proceeding before again being deported.

In 1994, INA § 245 was amended to make aliens who were physically present and had an immigrant visa immediately available eligible for a discretionary adjustment of status to lawful permanent resident. *See* Pub.L. No. 103-317, Tit. V, § 506(b), (c), 108 Stat. 1765, 1766, codified at 8 U.S.C. § 1255(i) (1994). By administrative practice, aliens in deportation proceedings were allowed to avoid removal by seeking and obtaining an adjustment of status to lawful permanent resident. *See* 8 C.F.R. § 242.17 (1995). Thus, after Alvarez-Portillo married a United States citizen in 1996, if the INS had commenced a deportation proceeding under this prior statutory regime for illegal reentry, his marriage would have made him a likely candidate for adjustment of status to lawful permanent resident, though such relief was within the discretion of the Attorney General. *See Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978).

Congress took dramatic steps to change this legal landscape in IIRIRA, replacing the little-used § 242(f) with new § 241(a)(5), a broader and far less forgiving reinstatement-of-removal provision:

> **(5) Reinstatement of removal orders against aliens illegally reentering.** If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under

> this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Congress's intent is readily apparent from IIRIRA's legislative history:

> Existing procedures to deny entry to and to remove illegal aliens from the United States are cumbersome and duplicative. Removal of aliens who enter the United States illegally, even those who are ordered deported after a full due process hearing, is an all-too-rare event.

H.R. Rep. 104-469(I), 1996 WL 168955 at *107;

> Aliens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General. . . . The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement.

S. Rep. 104-249, 1996 WL 180026 at *7. To implement this new statute, the INS adopted a summary administrative reinstatement-of-removal procedure in which "[t]he alien has no right to a hearing before an immigration judge," an immigration officer determines whether the alien is subject to reinstatement of a prior deportation order, and the alien is entitled only to written notice and an opportunity to "make a written or oral statement contesting the determination." 8 C.F.R. § 241.8(a), (b).

Unlike the prior reinstatement provision, § 241(a)(5) applies to all previously deported aliens, including Alvarez-Portillo, whose prior deportation was for entry without inspection. Moreover, in a § 241(a)(5) proceeding,

the alien may neither attack the validity of the prior deportation order nor avoid removal by obtaining discretionary relief such as an adjustment of status to lawful permanent resident. In this case, an immigration officer acting pursuant to 8 C.F.R. § 241.8 determined that Alvarez-Portillo was deported for entering the United States without inspection in November 1993 and unlawfully reentered in December 1993. If he was subject to reinstatement and removal in accordance with the new statute, the INS removal order must be affirmed.

III. The *Landgraf* Analysis.

In *Landgraf,* the Supreme Court confirmed that, while Congress may make civil legislation retroactive in most cases, the judicial presumption against retroactivity may be overcome only by a clear expression of congressional intent. However, the Court also recognized that "application of new statutes passed after the events in suit is unquestionably proper in many situations," even if the statute is silent as to its temporal reach. 511 U.S. at 273. The resulting doctrinal tension led the Court to articulate a two-part test for determining whether a subsequently-enacted federal statute may govern the events at issue:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If

> the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280. The question here is whether the INS decision summarily reinstating Alvarez-Portillo's prior deportation order and ordering his immediate removal under § 241(a)(5) passes muster under either part of this two-part test. As is often the case, these are difficult inquiries.

A. Part One. The issue under part one of the *Landgraf* analysis is whether we need not invoke the judicial presumption because the statute answers the retroactivity issue by prescribing that § 241(a)(5) either does or does not apply to aliens who illegally reentered prior to its enactment. Though § 241(a)(5) is silent as to its temporal reach, the INS argues that inferences may be drawn from other IIRIRA provisions, such as § 309, the general effective date section, to find the "unambiguous directive" that *Landgraf* requires for express retroactivity. 511 U.S. at 263. In our view, the Supreme Court rejected this contention in its recent decision in *INS v. St. Cyr,* 121 S.Ct. 2271 (2001). *St. Cyr* dealt with § 304(b) of IIRIRA, which repealed former 8 U.S.C. § 1182(c). The Court concluded that Congress had not made § 304(b) expressly retroactive to aliens such as St. Cyr:

> The presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien, forecloses the conclusion that, in enacting § 304(b), Congress itself has affirmatively considered the potential

> unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

121 S.Ct. at 2290 (citations and quotations omitted). We conclude this reasoning applies equally to § 241(a)(5).

After rejecting the INS's argument for express retroactivity, the Supreme Court in *St. Cyr* moved directly to part two of the *Landgraf* analysis. However, Alvarez-Portillo argues that, despite Congress's silence as to the temporal reach of § 241(a)(5), normal principles of statutory interpretation reveal a clear intent that the statute *not* apply to aliens who illegally reentered prior to IIRIRA's effective date. Three circuits have now considered this contention, reaching different conclusions. Panels of the Ninth and Sixth Circuits agree with Alvarez-Portillo, relying on the fact that the prior reinstatement provision, § 242(f), expressly stated that it applied to aliens whose deportation orders were entered before its effective date, Congress deleted this express retroactivity declaration in § 241(a)(5), and Congress included express retroactivity provisions in other sections of IIRIRA whereas § 241(a)(5) is silent as to its temporal reach. *See Castro-Cortez v. INS*, 239 F.3d 1037, 1050-52 (9th Cir. 2001); *Bejjani v. INS*, 271 F.3d 670, 684-87 (6th Cir. 2001).

In our view, this analysis is faulty because it assumes Congress intended to expressly resolve the question of retroactivity one way or the other. We think it more likely that Congress decided to allow the presumption of non-retroactivity – the "judicial default rule" as the Supreme Court described it in *Landgraf* and *Lindh v. Murphy*, 521 U.S. 320, 325 (1997) – to resolve the issue. Congress knew that § 241(a)(5) both extended the reinstatement procedure to additional classes of illegal reentrants and made

significant substantive and procedural changes to the reinstatement procedure. Congress also knew that the presumption only applies when a new statute has a "retroactive effect" – the issue in the second part of the *Landgraf* analysis – and that changes in procedural rules are usually but not always applied retroactively, that is, to proceedings pending on the date of enactment. *See Martin v. Hadix,* 527 U.S. 343, 358-59 (1999); *Landgraf,* 511 U.S. at 275 & n.29. In these circumstances, we agree with the Fourth Circuit that Congress by its silence has not "unambiguously indicated either that § 241(a)(5) applies to all aliens or that it applies only to aliens that reentered the country after the statute's effective date." *Velasquez-Gabriel v. Crocetti,* 263 F.3d 102, 108 (4th Cir. 2001). Therefore, we must proceed to the second part of the *Landgraf* analysis, as the Supreme Court did in both *Martin,* 527 U.S. at 356-57, and *St. Cyr,* 121 S.Ct. at 2290.[2]

B. Part Two. The second part of the *Landgraf* test asks whether applying a new statute to prior conduct "would have retroactive effect." 511 U.S. at 280. This inquiry is essential because, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. The determination of whether the presumption against retroactivity should be invoked

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[2] Though the Supreme Court in *St. Cyr* did not discuss this issue, it affirmed a Second Circuit opinion that expressly rejected the contention that "the absence of specific retrospective language ... requires the court to infer by negative implication that Congress clearly intended IIRIRA § 304 to apply prospectively." *St. Cyr v. INS,* 229 F.3d 406, 416 n.5 (2d Cir. 2000).

> demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment. A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

St. Cyr, 121 S.Ct. at 2290-91 (quotations omitted).

Because § 241(a)(5) altered the prior reinstatement procedure in many ways, an initial question is whether *any* retroactive effect would make the *entire* statute inapplicable to aliens in Alvarez-Portillo's position. We think not. In *Landgraf,* the Court interpreted the instruction in the Civil Rights Act of 1991 that its provisions were to take effect upon enactment "to mean that courts should evaluate *each provision* of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." 511 U.S. at 280 (emphasis added). Section 309(a) of IIRIRA contains the same instruction. The principle that each statutory change should be separately analyzed for retroactive effect is particularly important for statutes, such as § 241(a)(5), that include both procedural and substantive changes to prior law. Accordingly, we will examine each change to determine whether its application to Alvarez-Portillo would result in an impermissible retroactive effect under part two of the *Landgraf* analysis.

1. Section 241(a)(5) extended the reinstatement procedure to Alvarez-Portillo and other illegal reentrants whose initial deportation order was based upon entry without inspection. Whether a removal proceeding

commenced after IIRIRA's effective date results in a new deportation order, or the reinstatement of the prior order, is a change that is entirely procedural and prospective. No illegally reentering alien has a reasonable expectation that his prior deportation order will not be reinstated for purposes of effecting a second removal. Thus, INS properly sought Alvarez-Portillo's removal by means of a § 241(a)(5) reinstatement proceeding.

2. Section 241(a)(5) provides that, in a reinstatement proceeding, "the prior order of removal . . . is not subject to being reopened or reviewed." Again, this change is entirely procedural and prospective. Illegally reentering aliens have no reasonable expectation that they will be entitled to collaterally attack their prior, final deportation orders in a subsequent removal proceeding.

3. The INS has construed § 241(a)(5) as mandating a more streamlined reinstatement procedure. Therefore, its implementing regulation provides the alien with notice and an opportunity to be heard but authorizes an immigration officer to make the required fact findings and enter a reinstatement order in summary fashion. 8 C.F.R. § 241.8. This is clearly a permissible interpretation of the statute that is entitled to substantial judicial deference. *See Escudero-Corona v. INS,* 244 F.3d 608, 612 (8th Cir. 2001). Once again, it is a prospective change in the applicable removal procedures. In IIRIRA, Congress intended to reduce the delays incident to removing aliens who have illegally reentered. Illegal reentrants have no entitlement to such delays and no reasonable expectation that prior inefficiencies in the administration of our immigration laws would continue indefinitely. Thus, there is no impermissible retroactive effect when INS conducts reinstatement proceedings commenced after IIRIRA's enactment

using the procedures adopted to implement § 241(a)(5), even if the substantive issue is whether preenactment conduct warrants an alien's removal.

4. That brings us to the most critical issue raised by this appeal, whether the provision in § 241(a)(5) that an alien subject to reinstatement "may not apply for any relief under this chapter" results in an impermissible retroactive effect when applied to an illegal reentrant such as Alvarez-Portillo, who illegally reentered prior to IIRIRA's enactment. The INS argues that reinstatement of removal cannot have a retroactive effect because Alvarez-Portillo had no vested right to remain in the United States, § 241(a)(5) did not impose a new legal duty or attach new legal consequences to his prior illegal reentry, and his removal or deportation is prospective in nature. These arguments have some force. *See Castro-Cortez,* 239 F.3d at 1053-54 (Fernandez, J. dissenting). But we conclude they are contrary to the decision in *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997).

Hughes Aircraft involved a qui tam action brought under the False Claims Act against a government subcontractor accused of filing false claims in connection with Air Force contracts. All the relevant conduct occurred at a time when the False Claims Act barred qui tam suits based on information already in the government's possession. Before the lawsuit was brought, however, the Act was amended to disallow defenses premised on the government's possession of the information. *See* 31 U.S.C. § 3730(e)(4)(A). The qui tam relator in *Hughes Aircraft* argued that this amendment should apply because it imposed no new duties with respect to transactions already completed, created no new cause of action, and did not increase the defendant's potential liability for making

a false claim. Applying *Landgraf,* the Supreme Court rejected this contention, concluding that the statute eliminating this disclosure defense would have an impermissible retroactive effect if applied in a case where the alleged false claims and the disclosures to the government occurred before enactment. *See* 520 U.S. at 951-52.

The retroactive effect issue in this case is virtually identical to the issue decided in *Hughes Aircraft.* Alvarez-Portillo, who was deported and illegally reentered in late 1993, married a United States citizen in 1996, prior to the effective date of § 241(a)(5). At that time, long-standing INS practice created a reasonable expectation that he could defend against later deportation or removal by seeking a discretionary adjustment of status to lawful permanent resident. The presumption against retroactivity of civil statutes is based in part on principles reflected in the Ex Post Facto Clause, Article I, § 10, cl. 1, of the Constitution. *Landgraf,* 511 U.S. at 266. A core ex post facto principle is that a new statute may not deprive a criminal defendant of a defense available at the time his alleged crime was committed. *See Collins v. Youngblood,* 497 U.S. 37, 52 (1990). *Hughes Aircraft* confirmed that this principle is fully applicable in defining impermissible retroactive effects in civil cases under part two of the *Landgraf* analysis. And *St. Cyr* established that a retroactive effect is impermissible even if its only impact is on relief that was discretionary under prior immigration law. "There is a clear difference," the Court explained, "between facing possible deportation and facing certain deportation." 121 S.Ct. at 2293, citing *Hughes Aircraft.*

In *Velasquez-Gabriel v. Crocetti,* 263 F.3d 102, 108-110 (4th Cir. 2001), the Fourth Circuit concluded that § 241(a)(5) had no impermissible retroactive effect because

the illegal reentrant could have applied for adjustment of status before IIRIRA's enactment, and therefore § 241(a)(5) did not attach new legal consequences to events completed before its enactment. We disagree. *Hughes Aircraft* held that the elimination of a substantive defense, without more, "attaches new legal consequences" to events completed prior to enactment that would give rise to liability under the new statute. That is precisely the effect of changing the law to provide that an illegal reentrant in a reinstatement proceeding under § 241(a)(5) "may not apply for any relief under this chapter." Under prior law, Alvarez-Portillo had a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding. He chose to wait, and § 241(a)(5) as applied by the INS has now deprived him of that defense. To this extent, we conclude the statute had an impermissible retroactive effect on his reinstatement and removal proceeding.

IV. Conclusion and Procedures on Remand.

In addition to arguing for non-retroactivity, Alvarez-Portillo urges us to conclude that the INS procedures for implementing § 241(a)(5) deprived him of procedural due process. Given our decision that further proceedings are necessary to remedy an impermissible retroactive effect, we decline to reach this issue.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge,* 424 U.S. 319, 334 (1976) (quotation omitted). The streamlined notice and opportunity to be heard afforded illegal reentrants under 8 C.F.R. § 241.8 seem quite appropriate when the only issues to be determined are those establishing the agency's right to proceed

under § 241(a)(5) – the alien's identity, the existence of a prior removal order, and whether the alien has unlawfully reentered. *Accord Alvarenga-Villalobos v. Ashcroft,* 271 F.3d 1169, 1173-74 (9th Cir. 2001); *see The Japanese Immigrant Case,* 189 U.S. 86, 101-02 (1903). On the other hand, we have now concluded that limiting the issues in this fashion resulted in an impermissible retroactive effect when applied to Alvarez-Portillo. Expanding the relevant inquiry on remand may well require adjusting the process that is due. That question is best addressed in the first instance by the affected agency. As the Supreme Court said in rather similar circumstances in *Landon v. Plasencia,* 459 U.S. 21, 34-35 (1982):

> The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. . . . Congress did not intend to require the use of deportation procedures in cases such as this one. Thus, it would be improper simply to impose deportation procedures here because the reviewing court may find them preferable.

For the foregoing reasons, we grant Alvarez-Portillo's petition for review, vacate the INS removal-through-reinstatement order dated February 12, 2001, and remand to the INS for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 01-1430

Alfonso Alvarez-Portillo, Petitioner, v. John Ashcroft, Attorney General; Mary Ann Wyrsch, Commissioner, Immigration and Naturalization Service; Michael Heston, District Director; Tex Othic, Head of Deportations, Kansas City INS, Respondents.	*	Petition for Review of an Order of the Immigration and Naturalization Service.

JUDGMENT

This cause was submitted on petition for review of an order from the Immigration and Naturalization Service, on the original record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the petitioner's petition for review is granted and the order of the Immigration and Naturalization Service be vacated and remanded for further proceedings in accordance with the opinion of this Court.

(5272-010199)

February 13, 2002

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

U.S. Department of Justice

Immigration and Naturalization Service

Warrant of Removal/Deportation

File No: **A29 658 964 (D-6)**

Date: **February 13, 2001**

To any officer of the United States Immigration and Naturalization Service:

Alfonso ALVAREZ-Portillo, aka: Oscar ALVAREZ
(Full name of alien)

who entered the United States at or near **Nogales, Arizona**, on or about **December 20, 1993**,
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

[X] an immigration judge in exclusion, deportation, or removal proceedings
[ ] a district director or a district director's designated official
[ ] the Board of Immigration Appeals
[ ] a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 241 (a)(5) of the Immigration and Nationality Act

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant

to law, at the expense of: the appropriation "Salaries and Expenses, Immigration and Naturalization Service (**FY-01**)," including the expenses of an attendant(s), if necessary.

/s/ M. Heston
(Signature of INS official)

District Director
(Title of INS official)

February 13, 2001 – Kansas City, Missouri
(Date and office location)

28 U.S.C. § 2412(d) Equal Access to Justice Act (EAJA) (inapplicable portions omitted)

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

. . . .

(2) For the purposes of this subsection –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, . . . ;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government;. . . .

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an

adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

INA § 245(i), 8 U.S.C. § 1255(i)

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –

(A) who –

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of –

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000.

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who –

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein

shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if –

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed . . . .

INA § 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii), in its context (emphasis added):

INA § 212(a)(9)(A) Certain aliens previously removed. –

(i) Arriving aliens. –

Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens. –

Any alien not described in clause (i) who –

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within

10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception. –

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

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8 C.F.R § 212.2(a), (e), & (i):

> 8 CFR § 212.2: Consent to reapply for admission after deportation, removal or departure at Government expense.
>
> (a) Evidence.
>
> Any alien who has been deported or removed from the United States is inadmissible to the United States unless the alien has remained outside of the United States for five consecutive years since the date of deportation or removal. If the alien has been convicted of an aggravated felony, he or she must remain outside of the United States for twenty consecutive years from the deportation date before he or she is eligible to re-enter the United States. Any alien who has been deported or removed from the United States and is applying for a visa, admission to the United States, or adjustment of status, must present proof that he or she has remained outside of the United States for the time period required for

re-entry after deportation or removal. The examining consular or immigration officer must be satisfied that since the alien's deportation or removal, the alien has remained outside the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act. Any alien who does not satisfactorily present proof of absence from the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony, to the consular or immigration officer, and any alien who is seeking to enter the United States prior to the completion of the requisite five- or twenty-year absence, must apply for permission to reapply for admission to the United States as provided under this part. A temporary stay in the United States under section 212(d)(3) of the Act does not interrupt the five or twenty consecutive year absence requirement.

. . . .

(e) Applicant for adjustment of status.

An applicant for adjustment of status under section 245 of the Act and Part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

. . . .

(i) Retroactive approval.

(1) If the alien filed Form I-212 when seeking admission at a port of entry, the approval of the Form I-212 shall be retroactive to either:

(i) The date on which the alien embarked or reembarked at a place outside the United States; or

(ii) The date on which the alien attempted to be admitted from foreign contiguous territory.

(2) If the alien filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.